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No. 91-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NEWARK MORNING LEDGER COMPANY,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR BLACK & DECKER CORPORATION, BRUNSWICK CORPORATION, INTERNATIONAL MULTIFOODS CORPORATION, AND NESTLÉ USA, INC., AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.3 of the Rules of this Court, this brief is respectfully submitted in support of petitioner by *amici curiae* Black & Decker Corporation, Brunswick Corporation, International Multifoods Corporation, and Nestlé USA, Inc. The parties have consented to the filing of this brief, and their written consents have been filed with the Clerk of the Court.

INTEREST OF THE AMICI CURIAE

Black & Decker Corporation is a manufacturer and marketer of consumer and commercial products such as power tools, accessories, and small household appliances. Brunswick Corporation is a manufacturer and marketer of prod-

ucts serving leisure markets in marine power, pleasure boating, and recreation, as well as selected defense and industrial technology sectors. International Multifoods Corporation is a diversified food company principally engaged in the manufacture and distribution of food products for the foodservices industry. Nestlé USA, Inc., is a manufacturer and distributor of food products. Each of these companies currently is engaged in a dispute with the Internal Revenue Service concerning the depreciability of intangible assets, and therefore they have a substantial interest in the Court's resolution of the question presented in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Until the Third Circuit's decision in this case, settled law held that the depreciability of an intangible asset was a question of fact dependent on the particular circumstances presented and could not be resolved as a matter of law. Nevertheless, and notwithstanding that the Internal Revenue Service itself adopted that position in its most recent revenue ruling on the depreciability of intangible assets, the Service now argues that certain intangibles are not depreciable as a matter of law because their inherent nature renders them nondepreciable goodwill. The courts squarely rejected this argument when it was first advanced 20 years ago, and they consistently have rejected it ever since. The government cannot cite a single decision (other than that below) to support its contention that the depreciability of an intangible asset is controlled by a *per se* legal rule regardless of the facts and circumstances demonstrated at trial. Indeed, in this very case, the government "*concede[d]*" in the district court that the issue of depreciation "is a factual one" (Pet. App. 32a (emphasis added)) but then abandoned that concession on appeal in the face of Judge Sarokin's adverse findings of fact.

The essential premise of the government's argument is that certain intangible assets intrinsically are (or are part of) goodwill and can be so determined as a matter of law even though the facts and circumstances at trial establish—as the district court expressly found here, and the court of appeals did not disturb—that the asset has both a reasonably determinable limited useful life and an ascertainable value. Because IRS regulations specifically state that goodwill is not depreciable, the government reasons, assets that "quintessentially" (Pet. App. 3a) partake of or contribute to goodwill cannot be depreciated. The government's quest for a Platonic form of goodwill is futile and offers no workable standard for the administration of the tax code.

As Congress, the IRS, and the courts long have recognized, the defining characteristic of goodwill is that it has an indefinite life, and therefore it does not qualify for a depreciation deduction. Conversely, an intangible asset that, like petitioner's "paid subscribers," has a determinable limited useful life is not goodwill and, if a value can reasonably be ascertained, is depreciable. Simply put, an intangible asset that can (in the parlance of appraisers) be "lifed and valued" is not goodwill.

This concept of goodwill based on indefinite useful life is inherent in the tax statute and IRS regulations. Furthermore, unlike the government's proposed approach, it provides a practicable rule for applying the depreciation deduction. Although the government refers to goodwill in terms of the expectancy that existing customers will continue to patronize a business, that is only one of several different formulations found in the cases and was designed merely to explain the abstraction of goodwill in an intuitive and understandable way. It is a description, not a definition, and does not serve as an operable legal standard that can be rigorously and consistently applied in practice to resolve particular cases. Finally, the govern-

ment's approach is internally flawed; a number of intangible assets (for example, patents for popular products) could be said to contribute to continued customer patronage and thus be encompassed in goodwill, but nonetheless such assets unquestionably are depreciable (indeed, the IRS's regulation explicitly states that patents are depreciable, see 26 C.F.R. § 1.167(a)-3). In the end, it is the concept of determinable limited useful life that provides a meaningful legal standard to separate depreciable intangible assets from nondepreciable goodwill.

Over time, the experience under the tax code has been that additional categories of intangible assets have become depreciable as appraisal techniques for lifing and valuing them have improved. This evolution reflects not a change in the tax law but advancements in the appraisers' art that permit a life and value to be determined, based on all the relevant facts and circumstances, for an ever-increasing array of intangibles. Because the federal income tax is a tax on *net* income, this trend toward depreciation of more intangible assets accords with sound tax policy by better matching annual income with the costs (including the depreciation of wasting intangibles) incurred in that year in producing the income. Moreover, such treatment also is consistent with modern accounting rules both in this country and abroad, which emphasize the importance of depreciation of intangible assets to a fair statement of net annual income.

The government expresses the concern that this evolutionary improvement in the accuracy with which actual net income is determined has reduced the scope of nondepreciable goodwill. However, that concern not only provides no answer to the legal analysis supporting the "facts and circumstances" test for determining limited useful life, but it also ignores sound tax and accounting policies. If the government wishes to abandon the prevailing standard, substituting instead a rule of nondepreciability as a matter of law, it should ask Congress to amend the tax

code—something Congress specifically declined to do when it considered such a proposal in 1987.

ARGUMENT

AN INTANGIBLE ASSET THAT, AS A FACTUAL MATTER, HAS A DETERMINABLE LIMITED USEFUL LIFE AND A REASONABLY ASCERTAINABLE VALUE MAY BE DEPRECIATED

I. AN INTANGIBLE ASSET THAT, BASED ON ALL THE FACTS AND CIRCUMSTANCES, HAS A DETERMINABLE LIMITED USEFUL LIFE IS NOT GOODWILL AND IS SUBJECT TO DEPRECIATION

In this case the IRS disallowed petitioner's claimed depreciation deduction for its intangible asset of "paid subscribers" on the ground that the asset was "quintessentially goodwill" (Pet. App. 3a) and therefore nondepreciable. As a matter of law, according to the Service, it is not enough for the taxpayer to "demonstrate a reasonable estimate of useful life and an ascertainable value in order to depreciate a purchased intangible asset"; in addition, the taxpayer also must overcome "the fundamental legal hurdle" of establishing "that the asset *is not goodwill*." *Id.* at 7a. In the IRS's view, the "paid subscribers" asset "is the very essence of * * * goodwill" (*ibid.*) and hence nondepreciable as a matter of law.

Following a bench trial, the district court rejected the IRS's argument. It specifically made findings of fact that petitioner "has met its burden" of proving that its "subscribers had limited useful lives, the duration of which can be estimated with reasonable accuracy, and ascertainable values separate and apart from goodwill." Pet. App. 32a. Based on those findings, the court held that petitioner was entitled to a depreciation deduction.

Without setting aside these findings, the court of appeals reversed the district court's decision and sustained

the IRS's disallowance. It agreed with the Service "that, for tax purposes, there are some intangible assets which, notwithstanding that they have wasting lives that can be estimated with reasonable accuracy and ascertainable values, are nonetheless goodwill and nondepreciable." Pet. App. 29a. Such assets, the court held, "are generally not depreciable when acquired in conjunction with the sale of the underlying business as a going concern." *Ibid.*

The Third Circuit's holding cannot withstand analysis. Under a proper interpretation of the tax code, the touchstone of a depreciable intangible asset—and the dividing line between such an asset and nondepreciable goodwill—is the existence of a determinable limited useful life and a reasonably ascertainable value. Thus, it is an oxymoron to say, as the court of appeals did, that an asset is nondepreciable goodwill even though it can be lifed and valued. Rather, an intangible asset that has a determinable life and value based on all the relevant facts and circumstances is subject to depreciation, and no rule of law requires that it be treated as nondepreciable goodwill.

A. Under The Tax Statute And IRS Regulation, Depreciability Of An Intangible Asset Is Premised On The Concept Of Determinable Limited Useful Life

"[T]hat the federal income tax is a tax on net income * * * has been firmly imbedded in the tax statute from the beginning." *Commissioner* v. *Tellier*, 383 U.S. 687, 691 (1966); see also *id.* at 691-692 (quoting legislative history). "It is clear that the Congress intended the income tax laws 'to tax earnings and profits less expenses and losses,' carrying out a broad basic policy of taxing 'net, not . . . gross, income.' " *Tank Truck Rentals* v. *Commissioner*, 356 U.S. 30, 33 (1958) (citations omitted). To provide an accurate measure of net income on an annual basis, "the Code endeavors to match expenses with the revenues of the taxable period to which they are properly attributable." *INDOPCO, Inc.* v. *Commissioner*, 112 S. Ct. 1039, 1043 (1992).[1]

The depreciation deduction is an integral element of the statutory scheme for determining net income. See *INDOPCO*, 112 S. Ct. at 1042-1043. As the Court explained in *Commissioner* v. *Idaho Power Co.*, 418 U.S. 1, 10-11 (1974) (citations omitted):

> [Under the depreciation deduction], the asset's adjusted income tax basis is reduced to reflect the distribution of its cost over the accounting periods affected. * * * "[T]he purpose of depreciation accounting is to allocate the expense of using an asset to the various periods which are benefited by that asset." When the asset is used to further the taxpayer's day-to-day business operations, the periods of benefit usually correlate to the production of income. Thus, to the extent that [the asset] is used in such operations, a current depreciation deduction is an appropriate offset to gross income currently produced.

The depreciation deduction thus reflects the fact that "[t]he gain or loss in any year cannot be rightly ascertained without taking into account the amount of such [depreciation] cost that is justly attributable to that period of time. * * * [An] annual allowance for [depreciation] * * * is necessary in order to determine true gain or loss because postponement of deductions to cover [depreciation] * * * would distort annual income." *Gambrinus Brewery Co.* v. *Anderson*, 282 U.S. 638, 643, 645 (1931). Accordingly, the "primary purpose" of depreciation is to allocate "the cost entailed in the use * * * of the asset to the periods to which it contributes" (*Massey Motors* v. *United*

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[1] In rare instances, specifically identified deductions are disallowed for reasons of public policy. See *Tellier*, 383 U.S. at 691, 693 & n.10. No such express provisions or policy grounds exist here to require the denial of depreciation of intangible assets. On the contrary, as discussed in the accompanying text and below (see pages 23-24, *infra*), sound tax policy supports depreciation of intangibles that have a limited useful life and ascertainable value.

States, 364 U.S. 92, 104 (1960)) in order to "reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital assets." *Detroit Edison Co.* v. *Commissioner*, 319 U.S. 98, 101 (1943).

From the inception of the modern tax code in the Revenue Act of 1913, Congress has provided a depreciation deduction for "the exhaustion," "wear and tear," and (as added in 1918) "obsolescence" of business property. See 26 U.S.C. § 167(a);[2] Revenue Act of 1913, 38 Stat. 114, 172; *Haberle Crystal Springs Brewing Co.* v. *Clarke*, 30 F.2d 219, 220 (2d Cir. 1929) (discussing statutory history), rev'd, 280 U.S. 384 (1930). Congress's use of these terms clearly indicates its focus on the useful life of the asset to the taxpayer as the basis for the depreciation deduction. As then-Judge Blackmun explained, the plain language of the statute requires that a depreciation deduction be available for an "asset [that is] an exhausting one." *Northern Natural Gas Co.* v. *O'Malley*, 277 F.2d 128, 139 (8th Cir. 1960) (Blackmun, J., concurring). Thus, "if the asset is shown to be a wasting one used in the taxpayer's trade or business, a reasonable deduction must be allowed." *Houston Chronicle Publishing Co.* v. *United States*, 481 F.2d 1240, 1251 (5th Cir. 1973), cert. denied, 414 U.S. 1129 (1974) (citing *Northern Natural Gas*).

Congress itself recently has indicated its understanding that depreciability of intangible assets turns upon the existence of a determinable limited useful life. In 1987, the House passed a bill that included a provision to deny depreciation for customer-based or market-based intangibles

[2] In its current form, Section 167(a) provides:

Depreciation

(a) **General rule.**—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—

(1) of property used in the trade or business, or

(2) of property held for the production of income.

such as "paid subscriber" assets. Although other sections of the House bill were enacted into law in the Omnibus Budget Reconciliation Act of 1987 (Pub. L. No. 100-203, Title X, 101 Stat. 1330, 1330-382), the Conference Committee rejected the provision eliminating depreciation of these intangible assets. In thus declining to amend current law, the Conference Report summarized the prevailing law as follows:

> No such [depreciation] deductions are allowed * * * with respect to property that is not a wasting asset or property whose useful life cannot be estimated with reasonable accuracy. * * * *[B]ecause goodwill does not have a determinable useful life, no depreciation deduction is allowed with respect to that intangible asset.* Accordingly, the portion of the purchase price of a business that is allocated to goodwill may not be amortized or depreciated.

H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 936-937 (1987) (emphasis added). This expression of the congressional understanding of the law that was being retained is a telling indication of the meaning of that law. See *Fribourg Navigation Co.* v. *Commissioner*, 383 U.S. 272, 283-284 (1966); see also *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 378 (1982).

The history of the IRS's promulgations under the depreciation statute confirms that determinable limited useful life is the guiding criterion for depreciability. In 1918 the Service issued its first regulation on depreciation of intangible assets. That regulation provided:

> *Depreciation of Intangible Property.*—Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance. Examples are patents and copyrights, licenses and franchises. Intangibles, the use of which in the business or trade is not so limited, will not usually be a proper subject of such an allowance. If, however, an intangible asset acquired through capital outlay is known from experience to be of value in

> the business for only a limited period, the length of which can be estimated from experience with reasonable certainty, such intangible asset may be the subject of a depreciation allowance, provided the facts are fully shown in the return or prior thereto to the satisfaction of the Commissioner. There can be no such allowance in respect of good will, trade names, trade marks, trade brands, secret formulas, or processes.

Reg. 45, Art. 163 (1918), quoted in *Red Wing Malting Co.* v. *Willcuts*, 15 F.2d 626, 628 (8th Cir. 1926), cert. denied, 273 U.S. 763 (1927). Thus, the 1918 regulation allowed depreciation for intangible assets whose use was "limited in duration" or whose value would remain "for only a limited period." Read in this context, the final sentence—which disallowed depreciation for goodwill and other intangible assets that had indefinite lives—was but a logical corollary of the central principle that depreciation was allowable for intangible assets with determinable limited useful lives.

This reading is substantiated by the IRS's amendment to its regulation a year later. At that time the Service deleted the last sentence of the 1918 regulation on the nondepreciability of goodwill. T.D. 2929, 1 C.B. 133 (1919). As the IRS explained:

> [The 1918 regulation] states that "Intangibles, the use of which in the trade or business is definitely limited in duration, may be the subject of a depreciation allowance." It is true that this same article states that no such allowance may be made in the case of intangibles of the class now under consideration [including goodwill], and while in general this negative decision is sound, *the controlling rule is the one quoted above, and when an item of intangible property falls within that rule it must be dealt with accordingly. [That is the] major rule laid down in [the 1918 regulation].* * * *
>
> *[W]hen it is demonstrated that the useful life of an intangible is definitely limited, such intangible then becomes a proper subject of depreciation allowance.*

T.B.R. 44, 1 C.B. 133, 134-135 (1919) (emphasis added). The 1919 regulation therefore made explicit what was implicit in the 1918 regulation: (1) the "major" and "controlling" rule is that intangible assets whose use is "limited in duration" are "a proper subject of depreciation," and (2) the statement disallowing a depreciation deduction for goodwill, while "in general * * * sound," was not an independent prohibition but rather derived from the preceding rule as applied to assets that had indefinite lives.

In 1927 the IRS again amended its regulation "[i]n view of the decision of the * * * Eighth Circuit" in *Red Wing Malting Co.* v. *Willcuts*, *supra*. See T.D. 4055, VI-2 C.B. 63 (1927). *Red Wing* held that the goodwill of a company involved in the production of liquor, even though limited in duration by the enactment of Prohibition, was not subject to a depreciation deduction for obsolescence because "there can be no wear or tear of good will, or exhaustion thereof by use[.] * * * [The statute] limits the allowance for [depreciation] to such property as is susceptible to exhaustion, wear, and tear by use in the business, and good will is not such property." 15 F.2d at 633. Thus, *Red Wing* did not involve the definition of goodwill but rather turned on whether goodwill fell outside the depreciation statute because it was not subject to exhaustion, wear, and tear.[3] In light of *Red Wing*'s holding that goodwill is not a wasting asset and hence is not depreciable, the IRS added the following sentence to its regulation:

> No deduction for depreciation, including obsolescence, is allowable in respect of good will.

T.D. 4055, VI-2 C.B. at 63.

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[3] This Court subsequently affirmed the *Red Wing* holding in *Clarke* v. *Haberle Crystal Springs Brewing Co.*, 280 U.S. 384, 386-387 (1930), but on the different ground that "Congress cannot be taken to have intended such a partial compensation to be provided for [through an abatement of taxes] by the words 'exhaustion' or 'obsolescence.' Neither word is apt to describe termination by law as an evil."

In substantially this form, the IRS's regulation on the depreciation of intangible assets has continued from 1927 to the present. See 26 C.F.R. § 1.167(a)-3.[4] As the IRS explained in its brief to the Third Circuit in this case (at 28 (emphasis added)), the "*basic premise of the Regulation [disallowing depreciation of goodwill is] that goodwill has an indeterminate useful life.*" See also Gregorcich, *Amortization of Intangibles: A Reassessment of the Tax Treatment of Purchased Goodwill*, 28 TAX LAWYER 251, 253 (1975) ("The regulations thus settle on *limited useful life* as the essential requirement for amortization. Goodwill is viewed as having no ascertainable economic life apart from the business itself, and therefore, as having an indeterminate useful life"); Note, *Amortization of Intangibles: An Examination of the Tax Treatment of Purchased Goodwill*, 81 HARV. L. REV. 859, 863 (1968) ("Treasury Regulation 1.167(a)-3 * * * denies a [depreciation] deduction for goodwill on the ground that it does not have a determinable useful life estimable with reasonable accuracy").

This history demonstrates that the IRS's regulation distinguishes between depreciable intangible assets and nondepreciable goodwill on the basis of determinable limited useful life. If an asset is a wasting asset—in other words,

[4] In its current form, Section 1.167(a)-3 provides:

Intangibles.

If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are patents and copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. No deduction for depreciation is allowable with respect to goodwill. For rules with respect to organizational expenditures, see section 248 and the regulations thereunder. For rules with respect to trademark and trade name expenditures, see section 177 and the regulations thereunder.

if it is subject to exhaustion, wear, and tear—and its useful life is determinable, it is depreciable. That is the controlling rule embodied in the regulation. If, however, the asset is not subject to exhaustion or otherwise does not have a determinable life, then, under the reasoning of *Red Wing* as incorporated in the regulation, it is not depreciable. The amendment to the regulation following *Red Wing* served to make that conclusion clear, not to repudiate the general rule by establishing a freestanding prohibition that severed the depreciation deduction from useful life. The concept of determinable limited useful life is the compass that the tax law provides to navigate the uncharted reaches of depreciability.[5]

B. Uniform Case Law And The IRS's Own Non-Litigation Position Establish That A "Facts And Circumstances" Test Governs Depreciability

With the singular exception of the Third Circuit's ruling in this case, judicial decisions consistently have recognized that the issue whether an intangible is a depreciable asset or nondepreciable goodwill raises a question of fact to be determined on the particular circumstances presented and cannot be resolved as a matter of law. For example, in *Donrey, Inc.* v. *United States*, 809 F.2d 534 (8th Cir. 1987), the court of appeals held that the acquired subscriber list of a newspaper—which is indistinguishable from petitioner's "paid subscribers" asset in this case—was depreciable. In affirming a jury verdict in favor of the taxpayer on the depreciation issue, the court stressed that "[e]ntitlement to a depreciation allowance for an intangible asset is a question of fact." *Id.* at 536. The uniform holdings of other circuits, as well as the Court of

[5] This reading also comports with the basic principle of administrative law that an agency's regulation should be construed to "harmonize[ ] with the plain language of the statute" under which it was promulgated. *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 477 (1979).

Claims and the Tax Court, are to the same effect. See, *e.g.*, *Citizens & Southern Corp.* v. *Commissioner*, 919 F.2d 1492 (11th Cir. 1990) (*per curiam*), aff'g upon the opinion below 91 T.C. 463, 479 (1988) (depreciability "is essentially a factual question"); *Houston Chronicle*, 481 F.2d at 1245-1251, 1253 ("amortizability for tax purposes must turn on factual bases"); *Richard S. Miller & Sons, Inc.* v. *United States*, 537 F.2d 446, 452 (Ct. Cl. 1976) ("[e]ntitlement to a depreciation allowance is a question of fact"); *IT&S of Iowa, Inc.* v. *Commissioner*, 97 T.C. 496, 508 (1991) ("[w]hether such requirements have been met is essentially a question of fact," and the "inquiry is primarily factual"); *Colorado National Bankshares, Inc.* v. *Commissioner*, 60 T.C.M. (CCH) 771, 787, 788 (1990) (same). Thus, as the General Accounting Office recently summarized in a report to the congressional Joint Committee on Taxation, the issue of depreciability is decided "on the basis of facts and circumstances" on a "case-by-case basis." United States General Accounting Office, Report to the Joint Committee on Taxation, *Tax Policy: Issues and Policy Proposals Regarding Tax Treatment of Intangible Assets* 2, 39 (Aug. 1991).[6]

In adopting a "facts and circumstances" test, the courts have made clear that the depreciability of intangible assets cannot be decided as a matter of law. As the court explained in *Richard S. Miller & Sons*, 537 F.2d at 452:

[6] Therefore, as in *Fribourg Navigation Co.*, our interpretation finds strong "support among * * * lower federal courts that have recently dealt with this issue," including "the Tax Court itself." 383 U.S. at 287. Indeed, because of the Tax Court's special expertise and extensive experience in applying the code, its views should be accorded deference. See *United States* v. *Foster Lumber Co.*, 429 U.S. 32, 55 (1976) (Blackmun, J., dissenting); *Arrowsmith* v. *Commissioner*, 344 U.S. 6, 12 (1952) (Jackson, J., dissenting). This Court so held under a predecessor version of the tax code (see *Trust of Bingham* v. *Commissioner*, 325 U.S. 365, 371 (1945); *id.* at 379-381 (Frankfurter, J., corcurring); *Dobson* v. *Commissioner*, 320 U.S. 489, 498-499 (1943)), and the practical reasons supporting that conclusion remain equally applicable today.

> Entitlement to a depreciation allowance is a question of fact and not of law.
>
> There is no per se rule of nondepreciability or non-amortizability in every case that involves both goodwill and other intangible assets. The depreciability of [such] assets * * * is a factual question only.

See also, *e.g.*, *Houston Chronicle*, 481 F.2d at 1248-1249, 1253 ("[w]e reject * * * the establishment of a *per se* rule * * * that would amalgamate all subscription lists with goodwill"); *Citizens & Southern*, 91 T.C. at 483 (rejecting the argument that an intangible asset is "as a matter of law the equivalent of goodwill and, therefore, not depreciable"). In particular, the Eighth Circuit in *Donrey* rejected the IRS's argument that a newspaper's customer subscription structure and list were "part of the goodwill * * * [and accordingly] not depreciable as a matter of law." 809 F.2d at 535.[7]

The analytical foundation for this line of authority is the cardinal principle, embodied in the depreciation statute and regulation (see pages 8-13, *supra*), that an intangible asset of determinable limited useful life is subject to depreciation. By contrast, goodwill is deemed under the

[7] The demise of the so-called "mass asset rule" also demonstrates that depreciability cannot be adjudicated as a matter of law. The mass asset rule treated certain intangible assets such as customer lists as a self-regenerating collective whole that was not depreciable because it had no determinable limited useful life. As the Third Circuit recognized (Pet. App. 14a, 16a), the mass asset rule is "now outdated" and was "inter[red]" by *Houston Chronicle*, which rejected the concept and held that there is no "*per se* rule of non-amortizability in every case involving both goodwill and other intangible assets. * * * We reject * * * a monolithic 'mass asset' theory that would amalgamate all subscription lists with goodwill." 481 F.2d at 1249-1250, 1253. As its brief in the Third Circuit (at 29) makes evident, the government's position here is a thinly veiled effort to revive the discredited mass asset theory. See also *Citizens & Southern*, 91 T.C. at 482 ("it appears that [the Commissioner] is urging us to apply the 'mass asset' rule although he does not articulate his position as such").

tax law to have an indefinite useful life (see, *e.g.*, *Richard S. Miller & Sons*, 537 F.2d at 450; *IT&S*, 97 T.C. at 509; *Colorado National Bankshares*, 60 T.C.M. (CCH) at 789) and is excluded from depreciation precisely for that reason. See H.R. Conf. Rep. No. 495, at 936-937 (quoted at page 9, *supra*); Rev. Rul. 74-456, 1974-2 C.B. 65, 66 (quoted at page 19, *infra*); *Houston Chronicle*, 481 F.2d at 1248 & n.5; *Red Wing*, 15 F.2d at 633; Gregorcich, 28 TAX LAWYER at 253; Note, 81 HARV. L. REV. at 859; Gov't C.A. Br. at 28 (quoted at page 12, *supra*). Thus, the pivotal distinction between a depreciable intangible and nondepreciable goodwill is whether the asset has a determinable limited useful life:

> The most significant indication that an intangible asset is separate and distinct from goodwill is whether its useful life can be shown with reasonable accuracy to be of limited duration. The most important criterion is whether in fact it is a wasting asset.

Richard S. Miller & Sons, 537 F.2d at 452; see also, *e.g.*, *Houston Chronicle*, 481 F.2d at 1248 & n.5; *Colorado National Bankshares*, 60 T.C.M. (CCH) at 790. As the GAO recently concluded:

> Intangible asset costs can be amortized over the assets' useful lives if the assets can be separately identified and valued and if their specific useful lives can be determined. * * * Amortization is not allowed, however, for intangible assets like goodwill that do not have determinable useful lives.

GAO Report at 10.[8]

[8] Consistent with these settled precepts, the IRS conceded in the district court in this case that the issue of depreciability was one of fact. Only after the district court found the facts in favor of petitioner did the government switch to the argument on appeal that the "paid subscribers" asset was nondepreciable as a matter of law. See page 2, *supra*; see also *Donrey*, 809 F.2d at 537 (criticizing similar change in IRS's litigating position between trial and appeal).

Against this background, it becomes clear why the prevailing "facts and circumstances" test is—and must be—the applicable standard for the depreciability of intangible assets. Under the tax law, the dispositive determination is whether a limited useful life can be determined, which necessarily is factual in nature and must be based on the particular circumstances presented. If the taxpayer satisfies the burden (see *United States* v. *General Dynamics Corp.*, 481 U.S. 239, 245 (1987)) of proving a limited useful life in light of all the facts and circumstances, the asset is not goodwill and is subject to depreciation. As this Court has recognized in analogous situations, a "facts and circumstances" test is appropriate where "each case 'turns on its special facts' " (*INDOPCO*, 112 S. Ct. at 1044 (citation omitted)) and provides the "flexibility * * * necessary * * * to accommodate * * * the congressional intent to tax only net income." *Tank Truck Rentals*, 356 U.S. at 35. See also, *e.g.*, *Anderson* v. *Bessemer City*, 470 U.S. 564, 573-576 (1985) (discussing trier's institutional advantages in fact-finding and the significant deference appellate courts owe the trier's findings).

Of course, for depreciation to be claimed and computed, the taxpayer must demonstrate that an intangible asset has not only a determinable limited useful life but also a reasonably ascertainable value.[9] Although the valuation issue will be addressed below (see pages 28-30, *infra*), it

[9] The statute and regulation provide a "*reasonable* allowance" (26 U.S.C. § 167(a) (emphasis added)) for depreciation of an asset with a limited useful life "the length of which can be estimated with *reasonable* accuracy." 26 C.F.R. § 1.167(a)-3 (emphasis added). This standard of reasonableness is satisfied by "a rough estimate" (*United States* v. *Ludey*, 274 U.S. 295, 302 (1927)) or "reasonable approximation" that would be sufficient to "support a verdict for a plaintiff in an ordinary action for the recovery of money." *Burnet* v. *Niagara Falls Brewing Co.*, 282 U.S. 648, 654-655 (1931). As this Court has recognized, "there is a risk of error in such projections [of an asset's life and value], but prediction is the very essence of depreciation accounting." *Massey Motors*, 364 U.S. at 105.

may be observed at this point that these two elements—life and value—are encapsulated in the two-part standard of *Houston Chronicle* that has become the black-letter test for the depreciability of intangible assets (481 F.2d at 1251):

> [Under] § 167(a) of the Code and the Regulations promulgated thereunder, * * * [intangible assets] may be depreciated for tax purposes if taxpayer sustains his burden of proving that [they] (1) have an ascertainable value separate and distinct from goodwill, and (2) have a limited useful life, the duration of which can be ascertained with reasonable accuracy.

If an asset has a determinable useful life and ascertainable value, it necessarily is, for the reasons discussed above, "separate and distinct" from goodwill and thus depreciable. As the court correctly concluded in *Richard S. Miller & Sons* (537 F.2d at 454), "[a]n intangible asset is separate and distinct from goodwill when its useful life can be shown with reasonable accuracy to be of limited duration." See also *Citizens & Southern*, 91 T.C. at 515 (Cohen, J., concurring) (there is "no authority for the proposition that assets * * * are not separate and distinct from goodwill unless no part of their value is related to continued patronage of customers of an ongoing business"); GAO Report at 20 ("[t]he courts determine whether specific intangible assets are separate from goodwill and thus entitled to amortization if they have a determinable useful life and value").[10]

[10] The origin of the phrase "separate and distinct" is uncertain. It does not appear in either § 167 of the tax code or regulation 1.167(a)-3. As indicated in the text, the term is used in *Houston Chronicle* (and incorporated from that decision in Revenue Ruling 74-456). However, as this Court has cautioned, "the language of an opinion is not always to be parsed as though we were dealing with language of a statute." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979). In fact, *Houston Chronicle* used the term in the context of holding that the mass asset rule (see page 15 note

(Footnote continued on following page)

The IRS itself has officially adopted the "facts and circumstances" test of *Houston Chronicle*, disavowing the position—now resurrected in this litigation—that nondepreciability can be determined as a matter of law. In 1974, following the Fifth Circuit's decision in *Houston Chronicle* and this Court's denial of certiorari, the IRS issued Revenue Ruling 74-456 to reconsider two earlier revenue rulings on the depreciation of intangible assets. The Service explained that intangible assets such as goodwill that "have indeterminable lives * * *, *therefore*, are not subject to depreciation," but that an asset that "does not possess the characteristics of goodwill * * * and is of use to the taxpayer in its trade or business for only a limited period of time" is depreciable. In light of that principle, the Service "modified" the prior revenue rulings "*to remove any implication* that customer and subscription lists, location contracts, insurance expirations, etc., *are, as a matter of law, indistinguishable from goodwill possessing no determinable useful life.*" Rather, citing the two-part *Houston Chronicle* standard, the IRS expressly acknowledged that "*[t]he depreciability of assets of this nature is a factual question.*" Rev. Rul. 74-456, 1974-2

[10] *continued*

7, *supra*) did not bar depreciability if the asset had "an ascertainable value separate and distinct from goodwill" and therefore was not " 'inextricably' linked to goodwill." 481 F.2d at 1249, 1250. The phrase "separate and distinct" also is found in *Red Wing* in holding that goodwill was not a wasting asset subject to depreciation or obsolescence "even should we assume that good will, separate and distinct from tangible property, is property used in the business." 15 F.2d at 633. Of course, it now is a "realit[y] of modern business" that customer-based intangible assets are "bartered and sold as discrete vendible assets." *Houston Chronicle*, 481 F.2d at 1253; see also *Northern Natural Gas Co.*, 277 F.2d at 140 (Blackmun, J., concurring) (tax depreciability should "coincide with good business practice"). Whatever the derivation of the phrase, settled principles make it clear that an intangible asset that has a determinable limited useful life and reasonably ascertainable value is "separate and distinct from goodwill" for purposes of depreciation.

C.B. 65, 66 (emphasis added). See also Rev. Rul. 76-520, 1976-2 C.B. 42 (adhering to factual test of Revenue Ruling 74-456 in specific context of depreciability of subscription-based intangible).

Notwithstanding its litigation position, IRS officials continue to recognize the controlling applicability of the "facts and circumstances" test to determine whether an intangible asset has a determinable limited useful life and therefore is depreciable. For example, in testimony to Congress in October 1991, the IRS Chief Counsel acknowledged that Revenue Ruling 74-456 remains the Service's latest official promulgation on this issue and that, under its standard, "there are facts that would be relevant to" depreciation of an asset "separate and distinct from goodwill. * * * [The law] put[s] taxpayers to the test of trying to prove [such depreciation]." *A Bill to Simplify Tax Treatment of Intangible Assets and Related Legislation: Hearings on H.R. 3035 Before the House Comm. on Ways and Means*, 102d Cong., 1st Sess. 29 (Oct. 2 & 29, 1991) (testimony of IRS Chief Counsel Shashy). The Commissioner of Internal Revenue similarly stated that each case involving depreciation of intangible assets "presents another dispute on the facts" and "requires a particularized effort. * * * [E]ach case must be examined and litigated on a factual basis" and "becomes a challenge to the taxpayer's method of valuation, determination of useful life, and amortization method." *Id.* at 3, 4, 6 (prepared statement of IRS Commissioner Goldberg). And the Assistant Treasury Secretary for Tax Policy, after also noting that "decisions allowing amortization [under existing law] depend[ ] upon the facts of the particular case," specifically recognized that the Third Circuit's decision in this case created "a different world than the world that we're in." *Id.* at 13, 56-57 (testimony of Assistant Treasury Secretary Gideon). See also *id.* at 37 (statement of Rep. Vander Jagt)

(criticizing the "change in position taken by the IRS" that depreciability can be decided as a matter of law).[11]

C. The Judicial Trend Toward Greater Recognition Of The Depreciability Of Intangible Assets Confirms The "Facts And Circumstances" Test And Accords With Sound Tax Policy

Our submission—that an intangible asset is subject to depreciation if the taxpayer demonstrates that, under a "facts and circumstances" test, it has a determinable limited useful life—is confirmed by three-quarters of a century of experience under the depreciation provision of the tax code. This history shows a trend toward the depreciation of an ever-increasing number of intangible assets, which supports the "facts and circumstances" standard but is squarely irreconcilable with the government's assertion that an array of intangibles are nondepreciable as a matter of law.

The statutory provision for depreciation has not been changed in any relevant respect for some 75 years. See page 8, *supra*. Likewise, the IRS's regulation has remained substantially the same since 1927. See pages 11-12, *supra*. And the case law evidences no string of overruled decisions or other doctrinal reformation.

Notwithstanding this stability in the sources of governing law, it is quite clear that a variety of intangible assets

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[11] Because the IRS's argument rests on an unexplained change in its legal position (see also pages 9-13, *supra*), it is not entitled to deference from this Court. See, *e.g.*, *Fribourg Navigation Co.*, 383 U.S. at 279-280 ("[t]he Commissioner's position represents a sudden and unwarranted volte-face from a consistent administrative and judicial practice"); *Transco Exploration Co.* v. *Commissioner*, 949 F.2d 837, 840 (5th Cir. 1992) (the Commissioner "ought to do more than stride to the dais and simply argue in the opposite direction"); *Woods Investment Co.* v. *Commissioner*, 85 T.C. 274, 281-282 (1985); see also *Central Illinois Public Serv. Co.* v. *United States*, 435 U.S. 21, 31, 32 (1978) (rejecting IRS's argument that was inconsistent with regulations).

once held to be nondepreciable may be depreciated today. For instance, depreciation of customer structures and lists (like the asset involved in this case) at one time was disallowed but subsequently was permitted and has been regularly upheld since *Houston Chronicle*. See 481 F.2d at 1251; see also, *e.g.*, *Donrey*, 809 F.2d at 537; *Computing & Software, Inc.* v. *Commissioner*, 64 T.C. 223 (1975), acq., 1976-2 C.B. 1. Likewise, insurance expiry lists now are held to be depreciable even though such claims previously were disallowed. See *Richard S. Miller & Sons*, 537 F.2d at 451 & n.14.

The government's argument fails to account for this trend of decisions. Because the applicable statute and regulation have remained unchanged, the allowance of a deduction for an asset whose depreciation previously had been disallowed would be inexplicable if the government were correct that the depreciability of these assets is determinable as a matter of law. The consistent course of decisions over the past generation is a telling refutation of the government's basic argument.[12]

By contrast, the "facts and circumstances" test provides a ready explanation for this trend. That a decision (especially an older decision) denied a depreciation deduction for a type of intangible asset on the particular trial record presents no inconsistency with another (and much

[12] Even the older decisions disallowing the deduction analyzed the claimed depreciation as a matter of fact rather than as a matter of law. Surveying these cases, the court in *Houston Chronicle* explained that they "turn on * * * factual question[s] and thus stand not so much for the proposition that the type of asset is never amortizable as they do for the conclusion that the very asset involved failed to qualify for one or more particular reasons. * * * [M]ost of the cases denying § 167(a) deductions to intangibles clearly rest on a failure of the taxpayer to carry his burden of proof." 481 F.2d at 1245, 1246. This mode of analysis of the older opinions, even when ruling in favor of the government, is incompatible with the government's current argument that the depreciability of these assets is a question of law, not of fact.

later) decision allowing a deduction for the same type of asset on a completely different record. More to the point, appraisal methodologies have progressed over time based on greater experience, improved computer technologies, and better statistical analyses and economic models. In light of these advances, a limited useful life and reasonable value now can be determined for many assets that previously could not be lifed and valued. As the Tax Section of the New York State Bar Association recently explained, "the development of more sophisticated valuation techniques" has led to an "expansion in the number of intangibles taxpayers are able to amortize," and "[s]ince *Houston Chronicle* * * * the outcome of most cases on amortization of customer-based intangibles has rested to a large degree on the sophistication of the taxpayer's proof." *Report on Proposed Legislation on Amortization of Intangibles (H.R. 3035)*, 53 TAX NOTES 943, 946 (1991). Other commentators similarly have explained that, because goodwill consists of "all intangible commercial advantages which have not been specifically identified, valued and analyzed as to their useful lives," taxpayers "have been able to peel away at the sphere [of goodwill] by utilizing sophisticated and objective methods * * * to identify more and more of the intangible advantages [reflected in the purchase price of a business]." Gregorcich, 28 TAX LAWYER at 270. This evolution is limited not by a *per se* rule that renders certain intangible assets nondepreciable as a matter of law, as the government urges, but rather by the taxpayer's burden to prove "value and determinable life" on the basis of the relevant facts and circumstances. *Ibid.*

What is more, this trend toward depreciability of a wider range of intangible assets is supported by sound tax policy. As discussed above (see pages 6-8, *supra*), the federal income tax is intended to be imposed on net income, and this objective is best served by an accurate determination of deductions that matches expenses and income for each tax year. Disallowance of depreciation for wasting

intangible assets runs counter to that principle for, as the GAO recently explained, it

> fails to recognize the economic benefits that wasting intangible assets contribute over time. * * * Denying amortization deductions does not result in an accurate determination of taxable income since expenses are not properly matched to income generated.

GAO Report at 5. Thus, "*[d]isallowing amortization of any wasting purchased intangible asset would not result in the proper matching of business expense and revenue.*" *Id.* at 37 (emphasis added).

Similarly, generally accepted accounting principles, both in this country and internationally, recognize the need to depreciate intangible assets to provide an accurate determination of income. See, *e.g.*, GAO Report at 11-12, 34-35; *1991 Hearings* at 12 (prepared statement of Assistant Treasury Secretary Gideon), 11-13 (testimony of Assistant Treasury Secretary Gideon). Whatever differences may exist in other respects between tax and financial accounting, here "they coincide in their overall objective to accurately measure income. * * * Although each system may use different technical rules to achieve their basic objectives, the accurate measurement of income is fundamental to both of these systems." GAO Report at 12.[13] Allowing depreciation for intangible assets that have a determinable limited useful life thus "is in accord with sound principles of accounting" (*Niagara Falls Brewing Co.*, 282 U.S. at 654) and satisfies the "primary concern" that depreciation be treated "in a manner that comports with accounting and taxation realities." *Idaho Power Co.*, 418 U.S. at 10. See also *Northern Natural Gas Co.*, 277 F.2d at 140

[13] Indeed, modern accounting principles treat goodwill itself as a depreciable asset. While, in light of IRS regulation 1.167(a)-3, the tax law does not go that far, generally accepted accounting principles support depreciability of intangible assets that have a determinable limited useful life.

(Blackmun, J., concurring) (tax depreciation should "coincide with * * * good accounting"). While financial accounting is not controlling on tax issues, it is at least relevant (see *Thor Power Tool Co.* v. *Commissioner*, 439 U.S. 522, 540 (1979) ("in most cases, generally accepted accounting practices will pass muster for tax purposes")) and, on the present question, confirms the depreciability of petitioner's customer-based intangible.

D. The Government's Proposed Denial Of Depreciability As A Matter Of Law Is Unsound In Principle And Unworkable In Practice

The government's argument hinges on its definition of goodwill as the expectancy that existing customers will continue to patronize the business in the future. Significantly, that definition nowhere appears in the tax code or IRS regulation. On the contrary, under the statute (which does not even mention goodwill) and regulation (which does not define goodwill), the distinction between depreciable intangible assets and nondepreciable goodwill is determinable limited useful life. See pages 8-13, *supra*.

Furthermore, the definition proffered by the government is simply one of several different meanings given to goodwill. The term has "a varying content" and has been variously described, for example, as an intangible asset that "has no ascertainable useful life," "the aggregate of all of the intangibles of a business," "the return on all the intangibles of a business," "a rate of return on investment which is above normal returns in the industry," and "the expectancy that the old customers will resort to the old place * * * [for any of] the imponderable qualities that attract customers." *Richard S. Miller & Sons*, 537 F.2d at 450-451. Even the Third Circuit acknowledged that goodwill is an "elusive concept" and that there is no "uniform," "coherent," or "clear" definition of the term. Pet. App. 10a n.5. In fact, two or more for-

mulations often appear side-by-side in opinions—as they did in the district court's opinion in favor of petitioner in this case (*id.* at 45a). See, *e.g.*, *IT&S*, 97 T.C. at 507 n.11; *Citizens & Southern*, 91 T.C. at 480-481; *Computing & Software*, 64 T.C. at 232-233. The government has advanced no ground—other than its desire to prevail in this litigation—for what is its essentially arbitrary and unsubstantiated choice among these meanings.[14]

Worse yet for the government, its concept of goodwill does not provide a definition that has a determinate content and is capable of rigorous and consistent application. Goodwill is a highly abstract and amorphous idea that first developed precisely because of the inability to identify specifically all of the constituent elements of the value of a business. To make the idea more intelligible, it was sometimes discussed in terms of a familiar and observable consequence: the continued patronage of customers. But that formulation is simply an intuitively understandable *description*, not a *definition* or standard that can practicably be applied to guide administration of the tax laws and

[14] Moreover, it is not unanimously agreed that continued customer patronage by itself amounts to goodwill:

> [T]he phenomenon of customer loyalty, or habitual return, unaccompanied by some measure of economic success or potential for excess earnings, does not indicate the presence of goodwill. * * * It is only when public confidence, financial and commercial credit, and the other elements of competitive advantage produce earnings, or their potential, in excess of normal returns that the element of goodwill can be isolated.

Note, 81 HARV. L. REV. at 860. In fact, contrary to the government's position, courts have recognized that an operating business with continued customer patronage may have no goodwill in some circumstances. See, *e.g.*, *Montgomery Coca-Cola Bottling Co.* v. *United States*, 615 F.2d 1318, 1322 (Ct. Cl. 1980) (no goodwill in business operated pursuant to a franchise); *Zorniger* v. *Commissioner*, 62 T.C. 435, 444-445 (1974) (same); *Pensacola Greyhound Racing, Inc.* v. *Commissioner*, 32 T.C.M. (CCH) 1064, 1069 (1973) (no goodwill in monopoly or quasi-monopoly market).

resolve contested cases; it does "no more than to describe the elephant by talking about the place in which the elephant lives." Gregorcich, 28 TAX LAWYER at 274. Because it lacks analytical content, the government's approach to the depreciability of intangibles is a prescription for confusion and continuing disputes in this important area of the tax code. Indeed, its position exacerbates what the IRS Commissioner aptly characterized as "the oppressing burden of seeking answers to metaphysical questions." *1991 Hearings* at 9 (prepared statement of IRS Commissioner Goldberg).

In addition to this unworkable uncertainty, the government's approach is conceptually flawed. The government assumes that some intangible assets are "quintessentially goodwill" or "the very essence of * * * goodwill" (Pet. App. 3a, 7a) and that such assets are nondepreciable even though "they have wasting lives * * * and ascertainable values." *Id.* at 29a. Courts have soundly rejected, however, this sophistical search for the true and inherent character of an asset. As the Tax Court has explained, courts should not "inquire into the intrinsic nature" of an asset to "determine whether it is, in essence, goodwill. * * * [W]here the useful life of an intangible is shown to be limited, depreciation is available even though for some purposes it is an element of goodwill." *Colorado National Bankshares*, 60 T.C.M. (CCH) at 789, 790; see also *Richard S. Miller & Sons*, 537 F.2d at 450; *Citizens & Southern*, 91 T.C. at 515 (Cohen, J., concurring) (intangible assets are depreciable even if "part of their value is related to continued patronage of customers of an ongoing business"). It is therefore well settled that an intangible asset is depreciable notwithstanding that it contributes to continued customer patronage and thus in some sense is part of goodwill, and "*any* portion of the purchase price may be amortized" if limited useful life

and ascertainable value can be established. Gregorcich, 28 TAX LAWYER at 270.[15]

Because of this conceptual flaw, the government's argument would incorrectly lead to the disallowance of depreciation for intangible assets that unquestionably are depreciable. For example, a patent may produce a desirable product or enhance a firm's general commercial reputation and thereby induce existing customers to continue to trade; under the government's definition, the patent would be part of goodwill and could not be depreciated. Nonetheless, the IRS's own regulation expressly states that patents are depreciable—and they are depreciable precisely because they are "of use in the business * * * for only a limited period * * * [whose length] can be estimated with reasonable accuracy." 26 C.F.R. § 1.167(a)-3. See also *Richard S. Miller & Sons*, 537 F.2d at 450. A "test" that leads to such untenable results as the government's is analytically incoherent and cannot be accepted.

II. THE REASONABLY ASCERTAINABLE VALUE OF AN INTANGIBLE ASSET IS A QUESTION OF FACT BASED ON ALL THE RELEVANT CIRCUMSTANCES

Like the issue of determinable limited useful life, the issue of reasonably ascertainable value of an intangible asset presents a question of fact for the trier to decide

[15] The government's position also flies in the face of the recent statutory provision and regulations that recognize that goodwill is not amenable to specific identification and valuation but rather merely represents the residual value of an ongoing business over and above the fair market value of all identifiable assets (both tangible and intangible). See 26 U.S.C. §§ 338(b)(5), 1060; 26 C.F.R. §§ 1.338(b)-2T(b)(2), 1.1060-1T(d). The statutory requirement that this residual valuation method be used codifies the Service's longstanding preference for this method of valuing goodwill. See S. Rep. No. 313, 99th Cong., 2d Sess. 252 (1986); see also Rev. Rul. 68-609, 1968-2 C.B. 327. Under the residual method, petitioner's "paid subscribers" would be separately valued and would *not* be included in goodwill.

based on the particular circumstances involved. The cases uniformly have treated the valuation issue as one of fact, and the government does not appear to challenge the valuation of petitioner's "paid subscribers" apart from its argument that such an asset is not depreciable at all. Under the analysis established in Section I, *supra*, the specific valuation methodology used has no bearing on whether the asset is depreciable *vel non*; once an asset has been determined to have a limited useful life, the validity of the valuation method is a separate issue. Accordingly, the government's effort to determine nondepreciable goodwill based on the particular valuation methodology used is misguided.

A number of valuation methodologies exist for intangible assets. As the district court stated, and as occurred in this case, "[t]he income approach is commonly used to value intangible assets of a going business, other than goodwill and going concern value." Pet. App. 43a. In brief, the income method determines the present value of the net income stream the asset is expected to produce over its useful life. See, *e.g.*, *Citizens & Southern*, 91 T.C. at 480, 498. "[T]he income approach is, in fact, what buyers and sellers would utilize to determine the price at which these assets would change hands" and "best reflects" an asset's fair market value. Pet. App. 43a. The government's approach would essentially preclude application of the frequently used income method in valuing intangible assets because, in its view, valuation based on future income *per se* would establish that an intangible is part of nondepreciable goodwill.

Under the correct analysis, the ultimate question for the trier is whether the taxpayer's valuation is reasonable in light of the facts and circumstances presented. See 26 U.S.C. § 167(a); page 17 & note 9, *supra*. Here, the district court, following a four-day bench trial, accepted "both the methodology and valuations submitted by [peti-

tioner's] experts." Pet. App. 45a. In an extensive opinion, the court carefully justified the income-method valuation used in this case. At the same time, it explained in detail the multiple defects in the government's cost method of valuation and the government's failure (indeed, refusal) to introduce any proof at trial to contest petitioner's application of the income method. *Id.* at 42a-47a. Significantly, although the court of appeals suggested that it might well have come to a different result if it had been the trier (*id.* at 29a-30a), it did not overturn a single one of the district court's valuation findings as clearly erroneous. Given the district court's undisturbed findings, any possible valuation issue was at an end.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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